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Supreme Court of the United States

October Term, 1935

THE PRUDENCE COMPANY, INC.,
Petitioner,

against

FIDELITY AND DEPOSIT COMPANY OF MARYLAND and AMERICAN BONDING COMPANY OF BALTIMORE,
Respondents.

No. 270

BRIEF IN OPPOSITION TO "MOTION TO CONSTRUE OR AMEND MANDATE".

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THOMAS E. WHITE,
Counsel for Respondents.

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BRIEF IN OPPOSITION TO "MOTION TO CONSTRUE OR AMEND MANDATE".

POINT I.

The mandate follows strictly the judgment of this Court and does not require either construction or amendment.

The judgment of this Court, dated February 3, 1935, provides in its material part as follows:

> "ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals, in this cause, be, and the same is hereby, modified as indicated in the opinion of this Court and, as thus modified, affirmed, The Prudence Company to recover its taxable costs in this Court."

The mandate to the District Court of the United States for the Southern District of New York included the provision from the judgment above quoted. It then ordered that the Prudence Company recover costs in the sum of $102.85.

No construction or interpretation is needed to arrive at the determination of this Court embodied in its opinion and judgment. Except for the modification contained in the opinion of this Court and carried into the judgment, that upon the new trial the District Court should follow the rules laid down for the measurement of damages, the judgment of the Circuit Court of Appeals was affirmed. The judgment of the latter court provided for an allowance of costs to the respondents here, and for execution (R. p. 885).

Furthermore, since the mandate is in exact conformity with the provisions of the opinion and the judgment of this Court, there is no reason for the amendment of the mandate. Although a mandate may be amended where the clerk has made such an error therein that it does not conform with the judgment (*St. Louis & San Francisco R. Co.* v. *Spiller*, 275 U. S. 156), this mandate is in exact conformity with the judgment.

The motion here does not assume to be one to amend the judgment of this Court.

POINT II.

The motion is, in effect, one for a rehearing, which should be denied because not made in accord with the rules of this Court, and because the order granting certiorari does not permit the consideration of the question now presented.

The motion assumes to be one to construe or amend the mandate so as to provide that the judgment of the Circuit Court of Appeals allowing costs to the respondents should be reversed, or that such judgment should be modified to provide that the allowance of costs should abide the event of another trial.

The Circuit Court of Appeals held that the District Court was in error in allowing interest on mortgage and taxes and in excluding evidence of waiver by petition of omissions and substitutions. That court also held that recovery for omissions and substitutions, if not waived, was limited to the extent that they diminished the value of the building. No evidence had been offered by the petitioner on the former trial to establish such loss of value.

As pointed out in this Court's opinion, the petitioner did not specify as error in the petition for the writ of certiorari the ruling of the Circuit Court of Appeals that there must be evidence of diminished value before recovery could be had for omissions and substitutions, and for that reason the ruling was not reviewed by this Court and was assumed to be correct.

This Court also refused to consider the ruling of the Circuit Court of Appeals on the question of waiver. This Court limited its review solely to the question of whether the measure of damages to be applied would justify the re-

covery of loss of rental value during the period of delay in completion.

Impliedly, therefore, this Court approved the granting of a new trial by the Circuit Court of Appeals. This Court did not intend to and did not review the judgment of the Circuit Court of Appeals in its entirety. This Court did not reverse the judgment of the Circuit Court of Appeals in its entirety. The judgment of the Circuit Court of Appleads was modified, as shown by this Court's opinion, its judgment and its mandate, "by a direction that the measure of damages upon a new trial shall be that defined in this opinion, and as thus modified affirmed".

It does not seem open to doubt that that part of the judgment of the Circuit Court of Appeals which allowed costs to the respondents was affirmed by this Court.

For this Court now to consider the motion of the petitioner, it would be necessary, in effect, to grant a rehearing after the time for rehearing has expired, and to consider a matter which was not before it under its order granting a writ of certiorari.

A.

Under Rule 33 of the rules of this Court, a petition for a rehearing should be filed within twenty-five days after the judgment is entered, unless the time is enlarged by order of the Court.

The judgment herein was entered on February 3, 1936, and the time for rehearing expired on February 28, 1936.

No application was made for an extension of the time within which a petition for rehearing might be filed.

Under the circumstances, it is obvious that the petitioner is out of time on a petition for rehearing, and no facts have been presented in the motion papers to justify the hearing of the petition for rehearing after the time has expired.

B.

This Court, in granting the writ of certiorari, so limited the scope of its review as to preclude the consideration of the question whether that part of the judgment of the Circuit Court of Appeals awarding costs to the respondents should be reversed.

Rule 32, subdivision 3, of this Court, provides that in cases of reversal of any judgment by this Court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered.

The same practice is followed in the Circuit Court of Appeals for the Second Circuit. Its Rule 28, Subdivision 3, provides that in cases of reversal of any judgment in that court, costs shall be allowed to the party seeking review, unless otherwise ordered.

Under that practice the Circuit Court of Appeals, when reversing the judgment in this case, allowed costs to the respondents, and this Court, because it reversed the Circuit Court of Appeals in part, allowed costs to the petitioner in this Court.

Although this Court has no rule prescribing whether costs shall be allowed when the judgment is reversed only in part, it has long been the practice of the clerk to insert in the mandate in such cases a provision for payment of costs by the respondent, in the absence of specific direction by the Court.

St. Louis & S. F. R. Co. v. *Spiller,* 275 U. S. 156.

The judgment herein provided for the allowance of costs to the petitioner in this Court.

The reason why costs on reversal are uniformly allowed absolutely to the appellant is explained by the late Judge LACOMBE in *Jennings* v. *Burton,* 177 Fed. 603. In that case

the Circuit Court of Appeals reversed a judgment with costs (meaning costs of appeal), and declined to direct that they abide the event of a new trial. When the plaintiff recovered a judgment after the second trial, he wished to tax the costs which he had paid on the appeal, which was not permitted by Judge LACOMBE, who there stated:

> "The appellate tribunal imposed costs for error committed on the trial, for which defendant in error must be held responsible, and to allow reimbursement in the way suggested would practically be to annul its decision. I have consulted with the other Circuit judges before filing this memorandum."

Costs were allowed to the petitioner in this Court because it was able to satisfy this Court that the Circuit Court of Appeals was wrong in the respect that it limited the petitioner too greatly. The Circuit Court of Appeals allowed costs to the respondents in that court because it held that the trial court was wrong in certain respects.

This Court has not determined and it refused to determine that the Circuit Court of Appeals was not correct in holding that the Trial Court was wrong in certain respects. Since it is a general rule of practice that costs go to the prevailing party, no conceivable reason can be advanced why the prevailing party in the Circuit Court of Appeals should not be entitled to its costs.

In *Bailey* v. *Mississippi Home Telephone Co.*, 254 Fed. 358, the Court pointed out that the Pennsylvania rule that costs on a reversal are to abide the event of the suit does not obtain in the Federal courts.

The practice is general to allow costs to the prevailing party on appeal.

Miller v. *Hartwell*, 271 Fed. 385;
Berthold v. *Burton*, 169 Fed. 495.

The suggestion in the brief of petitioner that because it is the established rule in the courts of New York State that costs on appeal shall abide the event of the new trial, therefore such costs should abide the event of a new trial in the Federal courts, is without substance.

Section 1490 of the New York Civil Practice Act provides:

> "Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:
>
> 1. In an action wherein plaintiff is entitled to costs as of course, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court."

Under that section the appellate courts in New York have at times awarded costs absolutely to the appellant even where a new trial was ordered.

Sheehan v. *Coffey,* 208 App. Div. 240.

Even under the New York statute, therefore, it is obvious that it is within the discretion of the appellate court whether it will allow costs to the prevailing party absolutely. Although it may be the established practice to make the costs abide the event, there still is discretion in the court.

The only difference between that rule and the rule in the Circuit Court of Appeals, as well as in this Court, is that it is the established practice in the latter courts to allow costs absolutely to the prevailing party.

Since this Court refused, by its order for certiorari, to consider whether the Circuit Court of Appeals was justified

in allowing costs to these respondents, to now consider petitioner's motion would be to extend the scope of its review without order and under the guise of a motion to amend the mandate.

POINT III.

There is no justification for the statement in the moving papers respecting the plaintiff's recovery on the retrial.

We make this point only because we do not wish the Court to believe from our silence that we concur with the unjustified statement in the moving papers that the amount of the recovery on a retrial will be at least as large as the recovery after the first trial.

On the retrial, in accordance with this Court's opinion, the jury will have for consideration three items of damage; first, the amount necessarily spent to complete the building; secondly, the diminished value of the building by reason of omissions and substitutions; thirdly, the loss of rental value by reason of delay in completion.

Upon the former trial the plaintiff was allowed as a recovery for incomplete items the sum of $153,893.73. As pointed out in the opinion of the Circuit Court of Appeals, petitioner's own employees reported on the date of the default that the amount required to complete the building was $23,500.

At the previous trial the petitioner was allowed as recovery for omissions and substitutions the sum of $143,842.28, without one scintilla of evidence in the case that the value of the building had been decreased by the omissions and substitutions, and in the face of defendants' evidence that there had been no decrease.

The petitioner was allowed a recovery by the trial court before for the sum of $369,517.53 for interest on mortgage and taxes. Petitioner now claims that it will have no difficulty in establishing loss of rental to that extent.

At the previous trial the petitioner offered no evidence to establish the reasonable length of time it would take to do the work required to complete. If the jury sees fit to give credence to the petitioner's own inspector that it would cost $23,500 to complete, likewise the jury might well conclude that it would not take nine and one-half months to do $23,500 worth of work.

POINT IV.

The respondents are entitled to recover as costs the premium paid for a supersedeas bond.

After the judgment was rendered in the District Court, the respondents requested of petitioner that it waive the enormous supersedeas bond which would otherwise be required in order to stay proceedings under the judgment. That request was refused. It was no simple matter to obtain a supersedeas bond in the amount required. Under the rules of the court, the authorized surety companies are limited in the amounts which they can write. However, the supersedeas bond was furnished at great expense to the respondents.

The petitioner had a right to require the furnishing of a supersedeas bond. It also had the option of waiving such a bond, thereby relieving the respondents of the necessity of incurring this great expense. Having insisted upon the incurring of that expense, there is no valid reason why it should not now pay for that expense since the judgment to supersede which the expense was incurred was improper.

It has been the uniform practice in the Second Circuit to allow premiums on supersedeas bonds as proper items of disbursements. Judge LACOMBE allowed such premiums in the case of *Edison* v. *American Mutoscope Co.*, 117 Fed. 192. In *Consolidated Gas Co.* v. *Newton*, 291 Fed. 704, Judge LEARNED HAND, after referring to the decision of Judge LACOMBE in the *Edison* case *(supra)*, said:

> "It has * * * been our uniform custom to allow such items (premiums on supersedeas bond) in all sides of this court for the fourteen years that I have sat here, and no distinction has ever been drawn between law, equity or admiralty."

This very Court affirmed that holding of Judge LEARNED HAND in *Newton* v. *Consolidated Gas Co.*, 265 U. S. 78.

That practice of allowing such premiums to be taxed was reaffirmed by the Circuit Court of Appeals for the Second Circuit in *Williams* v. *Sawyer*, 51 Fed. (2d) 1004.

Such premiums are allowable as disbursements under Section 1518, subdivision 9 (a) of the New York Civil Practice Act, which provides:

> "The reasonable expense actually incurred in securing an undertaking to stay execution under a judgment or to stay the enforcement of a judgment in any other manner or the enforcement of a decree in equity subsequently reversed."

Conclusion.

The motion should in all respects be denied.

Respectfully submitted,

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